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# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1940**

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## No. 64

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THE TIMES-MIRROR COMPANY, A CORPORATION, AND L. D. HOTCHKISS,

*Petitioners,*

*vs.*

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES,

*Respondent.*

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**On Writ of Certiorari to the Supreme Court of California**

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## REPLY BRIEF OF PETITIONERS.

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## REPLY BRIEF OF PETITIONERS.

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In reply* to Supplemental Brief on Behalf of Respondent, petitioners respectfully submit:

**The questions presented are misunderstood and incorrectly stated by respondent.**

At pages 4 and 5 of our Petition, and at page 8 of our Brief, appear statements of the question presented. Re-

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* Italics ours unless otherwise noted.

spondent fails to understand, and accordingly does not correctly state, the question at pages 1 and 2 of the Supplemental Brief.

The Federal question involved is not as respondent suggests:

> Was the proper test applied?

but is as petitioners suggest:

> Applying the proper test, do the facts warrant an abridgment of the right asserted?

Upon an incorrect understanding and statement of the question, respondent advances its fifth contention (Supp. Br. pp. 49, *et seq.*), to the effect that the evidence may not be reviewed in this Court. Respondent's position simply stated (Supp. Br. pp. 49 to 52) is this:

> If the reasonable tendency test applied by the State Supreme Court is the correct test, no Federal question is involved because this Court is without authority to weigh "the sufficiency of the evidence to sustain the conviction" (Supp. Br. p. 49).

Where one asserts a constitutional right guaranteed under the First and Fourteenth Amendments, and the State court decides against the right as claimed, this Court does not stop with a determination that the correct test has been applied. The sufficiency of the evidence is considered. The rule was recently stated by this Court in *Norris* v. *Alabama*, 294 U. S. 587, 589-590:

> "That the question is one of fact does not relieve us of the duty to determine whether in truth a federal right has been denied. When a federal right has been specially set up and claimed in a state court, it is our province to inquire not merely whether it was denied

> in express terms but also whether it was denied in substance and effect. If this requires an examination of evidence, that examination must be made. Otherwise, review by this Court would fail of its purpose in safeguarding constitutional rights."

This rule has been frequently announced.*

Respondent's confusion is disclosed in the Supplemental Brief (p. 52) where it is declared that a determination of the proper standard accords due process within the meaning of the constitutional provision. The language used is:

> "If due process has been denied petitioners, it is because of failure to apply the proper legal standard to the evidence, not because of the determination of the proper factual inferences to be drawn from that evidence."

This is tantamount to declaring that in a state where the clear and present danger doctrine prevails and is applied, one cited for constructive contempt by publication, and found guilty over his protest that his utterance is protected under the First and Fourteenth Amendments to the Federal constitution, would not be heard to complain in this Court despite the entire absence of evidence to sustain the finding of clear and present danger.

Additional indication that respondent has confused the question of correct test with the question of abridgment of liberty of free press appears from a statement in the Supplemental Brief (p. 17) where, after a review of early English authorities, the Patterson and Toledo Newspaper Company cases and the Bridges case, respondent suggests

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* *Toledo Newspaper Co.* v. *United States*, 247 U. S. 402, 420; *Abrams* v. *United States*, 250 U. S. 616, 619; *Fiske* v. *Kansas*, 274 U. S. 380, 385-386; *Pierre* v. *Louisiana*, 306 U. S. 354, 358.

that some overwhelming reason should be advanced for departing from the reasonable tendency rule and declares:

> "Indeed, they should be able to furnish an affirmative answer to the query whether their 'present danger' doctrine,
>
> 'Is * * * a fundamental principle of liberty and justice which inheres in the very idea of free government and is the inalienable right of a citizen of such a government?' (*Twining* v. *New Jersey*, 211 U. S. at 106)."

Petitioners have not contended, and have not observed in the opinions of this Court any declarations that the clear and present danger doctrine "is a fundamental principle of liberty and justice which inheres in the very idea of free government and is the inalienable right of a citizen of such a government". The fundamental principle of liberty and justice here involved is freedom of speech and of the press. This we understand to be an inalienable right—one that inheres in the very idea of free government. This is a right, as we understand, so fundamental that if sacrificed "neither liberty nor justice would exist." (*Palko* v. *Connecticut*, 302 U. S. 319 at 326, 327.) Whether this fundamental principle of liberty and justice has been sacrificed "requires an examination of evidence".* Prior to an examination of the evidence the court must determine by what test it will examine the evidence. Whether it be the reasonable tendency adopted by the California courts, the dangerous tendency rejected in *Herndon* v. *Lowry***, the "requisite reasonable tendency" advocated by respondent (Supp. Br. p. 42), the clear and present danger doctrine frequently announced by this Court, or the actual obstruction principle advocated by some students of the problem,

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* *Norris* v. *Alabama*, 294 U. S. 587, 589, 590.

** 301 U. S. 242 at 256, 261.

its subsequent application to the record facts is necessary to enable the Court to determine whether or not the constitutional right of free speech or of free press has been abridged.

**Does respondent contend that reasonable tendency test and clear and present danger doctrine are identical?**

Petitioners are unable to determine whether respondent contends that the reasonable tendency test properly construed meets the requirements of the clear and present danger doctrine. In Brief of Respondent, page 42, the respondent declares:

> "The doctrine, [clear and present] as advanced by petitioners, is not essentially different from the reasonable tendency rule."

In discussing this topical heading respondent states:

> "Under this statement of the rule there is necessary to lawful restraint of speech only 'a clear and imminent danger of some substantive evil which the state constitutionally may seek to prevent.' And petitioners (at p. 18) concede that 'danger to the orderly administration of justice,' if clear and imminent, would measure up to the standard which they advocate."
>
> (Br. of Resp. p. 43.)

The subheading concludes with this statement:

> All counsel who advocate the danger doctrine find difficulty in formulating it so as to exclude 'tendency to influence' as the essential element."
>
> (Br. of Resp. p. 44.)

An element, and even an essential element, implies the necessity for other and additional elements. A part, no matter how essential, is not the whole. It may well be that

facts having a tendency to influence are an essential element of the clear and present danger doctrine.

In supplemental Brief of Respondent it appears that respondent has gone a long way toward admitting, if it has not actually admitted, that the clear and present danger doctrine is the proper test. At page 18 of Supplemental Brief respondent sets forth this subheading:

> "The Danger Doctrine is Not Essentially Different From the Reasonable Tendency Rule."

The first statement under this heading reads:

> "We showed in our former brief that the doctrines are essentially one (pp. 42-47); * * * and that each test presents in its application a question of fact depending for solution upon determining a matter of *degree* (pp. 44-47)—*degree of tendency* to interfere or of danger of interference."

Referring to the opinion of Mr. Justice Holmes in the *Schenck* case* respondent's Supplemental Brief (p. 20) states:

> "Explaining that 'it is a question of proximity and degree' the learned jurist found that the tendency of the document *was enough* to meet the danger test and in that connection specifically rejected the actual obstruction criterion."

This subsection of the Supplemental Brief (p. 23) concludes with this statement:

> "None of the later cases** throws any doubt upon the *substantial identity* of the reasonable tendency and the present danger tests."

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* 249 U. S. 52.

** *Schenck* v. *United States*, 249 U. S. 47; *Frohwerk* v. *United States*, 249 U. S. 204; *Debs* v. *United States*, 249 U. S. 211; *Pierce* v. *United States*, 252 U. S. 239; *Gitlow* v. *New York*, 268 U. S. 652; *Whitney* v. *California*, 274 U. S. 357.

Finally, in the Supplemental Brief, respondent imposes upon the reasonable tendency test a qualification or requisite that appears to indicate that the conception of reasonable tendency as entertained by respondent requires the degree of proof or degree of tendency encompassed within the clear and present danger doctrine.

Respondent states (Supp. Br. pp. 41-42):

> "The Los Angeles Times, through its localized circulation, lacks potentiality to interfere with the deliberations of the Supreme Court of the United States. And while an issue of the San Francisco Chronicle possesses sufficient momentum to reach the Supreme Court in San Francisco (1 Cal. (2d) 630), the same article, appearing in an inconspicuous country newspaper, would not have had the *requisite* reasonable tendency to disrupt the judicial calm. * * * Though relating to a different stage of the same cause, the question of reasonable tendency must be solved with reference to the *nature and place* of the utterance and its inherent momentum."

This concept of reasonable tendency, if it does not proceed all the way to the clear and present danger doctrine, approaches it so closely that it is not difficult to understand respondent's contention:

> "The danger doctrine is not essentially different from the reasonable tendency rule." (Supp. Br. p. 18.)

Respondent speaks of "the *requisite* reasonable tendency to disrupt the judicial calm" (Supp. Br. p. 42). "Requisite" in the ordinary acceptation of the term means necessary, indispensable, essential. Respondent also declares:

> "the question of reasonable tendency must be solved with reference to the *nature and place* of the utterance and its *inherent momentum.*" (Supp. Br. p. 42.)

Certainly this is a close approximation to the clear and present danger doctrine. It is an interpretation of the reasonable tendency doctrine by respondent which so construed justified its statement that it "is not essentially different from" the clear and present danger doctrine, which we here state:

> "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."*

The California courts, however, in the *Times* and *Bridges* cases, drew a well-defined line of distinction between the reasonable tendency rule and the clear and present danger doctrine. They specifically rejected the clear and present danger doctrine.** In the Brief of Respondent in Opposition to Petition for Writ of Certiorari (p. 42) respondent quotes from the opinion of the trial court to the effect that the clear and present danger doctrine has no application to contempt proceedings, and quoting the reason for such conclusion. In respondent's Supplemental Brief (p. 28) the same contention is again advanced under the topic heading:

> "As Now Defined by This Court the Present Danger Doctrine is Inherently Inapplicable to Contempt."

If, as respondent contends (Supp. Br. p. 18)

> "The danger doctrine is not essentially different from the reasonable tendency rule"

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* *Schenck* v. *United States*, 249 U. S. 47 at 52; *Herndon* v. *Lowry*, 301 U. S. 242 at 256.

** Times Trans. of Record, pp. 105-106, 122; Bridges Trans. of Record, p. 158.

and if, as respondent contends (Supp. Br. p. 28)

> "As now defined by this court the present danger doctrine is inherently inapplicable to contempt"

a confusing situation would result. Upon oral argument respondent may clarify this situation.

**Subjective and Objective Consideration.**

Respondent correctly understands our contention that the "clear and present danger" test is objective, the "reasonable tendency" test subjective. It declares:

> "Counsel apparently mean that the judge, in the one case, reaches his conclusion upon a consideration of proved facts and, in the other, draws it out of his own consciousness."
>
> (Supp. Br. p. 23.)

And

> "Quite obviously the rule does not permit of any 'presumed tendency', such as petitioners suggest."
>
> (Supp. Br. p. 23.)

The California Supreme Court nevertheless relied almost exclusively if not entirely upon presumed tendencies for justification of its decision; e.g. in a consideration of the editorial "Sit-Strikers Convicted" it held:

> "These expressions of approval of the verdict and condemnation of the convicted defendants made by such an influential paper as the Los Angeles Times on the day just preceding the day fixed by the court for pronouncing sentence *could not help having* an effect upon the trial judge, * * *. It cannot reasonably be said that they *would have no tendency* to influence the trial judge * * *. The editorial may not have been intended, but it is *capable of being construed*, as a notice

> to the trial judge that no leniency should be extended to the convicted men, and, furthermore, that should the court act contrary to the suggestions contained in the editorial, *it might well expect* adverse criticism in the columns of The Times. Viewing the editorial in the light of *these considerations,* we are satisfied that its reasonable tendency was to interfere * * *." (R. 128.)

Continuing its argument, respondent (Supp. Br. pp. 24-25) asserts that petitioners' counsel are somewhat inconsistent in invoking considerations of fact in discussing the sufficiency of the evidence to support the conviction. These considerations of fact for the most part appearing in the Chandler affidavit, admitted in the opinion of the Supreme Court to be true (R. 134) were overcome (so the California Supreme Court held) by the subjective inferences of the trial judge. Our statement is supported by the following declaration of the State Supreme Court:

> "From the facts set forth in said affidavit it is contended that the position of the Los Angeles Times was so well known in the City of Los Angeles * * * including the members of the judiciary of said county, that the superior judges before whom the two actions were pending would not be influenced nor would either of the defendants in either of said actions be prejudiced to any extent * * *. The weight to be given to this evidence was solely a matter resting with the trial court * * *. The affidavit of Mr. Chandler did no more than cause a *conflict in the evidence* which the trial court resolved against petitioner" (R. 134).

There is no conflict in the evidence on any material fact. We have attempted to draw from respondent a contradiction of this statement. In Petitioners' Brief (pp. 24, 25) we emphasize by unqualified direct statement the absence of any conflict in the evidence and the circumstance that "Despite the uncontradicted facts of the affidavit which the

Supreme Court declares are true (R. 134) the trial court nevertheless considering the editorial subjectively—i.e., independent of the record—concluded otherwise. This conclusion of the trial court the Supreme Court says created a conflict in the evidence (R. 134)." In the Supplemental Brief of respondent our contention is not mentioned. Respondent avoids this issue and by so doing, impliedly at least, admits the correctness of our statement. If there had been a conflict in the evidence, respondent would not have overlooked it. Under point IV of the Supplemental Brief (p. 44) such conflict would have been scheduled and cited in support of the contention that no Federal question is presented and that the writ should be dismissed. Under point V (p. 49), where it is declared "The sufficiency of the evidence to sustain the conviction is not open to review here," the conflict of evidence would have been stressed, but we find no mention of conflicting evidence. The only conflict is between the facts of the affidavit accepted as true, and the inferences or conclusions arrived at by the trial judge from a subjective or introspective consideration of the reasonable tendency of the editorials.

The absence of any conflict in the record is well illustrated by the following statement from the dissenting opinion of Chief Justice Gibson:

> "The Times is charged with obstructing justice and interfering with a pending judicial proceeding, and there is no evidence whatever of such obstruction or interference." (R. 146).

**There was no finding of successful obstruction of pending causes.**

Concluding its distinction of objective and subjective consideration, respondent states (Supp. Br. p. 27):

> "The Supreme Court's discussion of the various editorials shows that all of petitioners' constituents of an

> 'objective conclusion' were considered by it and the actual result was a *finding* that there had been such successful obstruction of the pending causes that 'the detriment caused by the publication of said editorials was *the probable denial of a fair trial** to the litigants in the actions then pending before the courts which were the subject of said editorials."

There is no "finding that there had been such successful obstruction of the pending causes". Findings in their entirety appear in the record, pages 60 and 61, and 88. Respondent evidently refers to the conclusion of the Supreme Court arrived at by processes of assumption that the result of the editorials "was the probable denial of a fair trial" (R. 138).

**There has been no "virtual confession of guilt upon the count relating to 'Probation for Gorillas?'"**

This contention ("virtual confession of guilt*") was advanced by respondent in its Brief in Opposition to Petition for Writ of Certiorari (pp. 5-7). The utter lack of support in the record for the contention, together with the grave importance of a question before the Supreme Court of the United States involving an interpretation of the constitutional right of freedom of speech and of the press when thought to conflict with the necessity for maintaining the independence, integrity and impartiality of the courts, caused us to pass the claim unnoticed. In the Supplemental Brief of Respondent the contention is again advanced (Supp. Br. p. 27). An excerpt from the statement of counsel for petitioners made at the close of the hearing in the trial court is quoted in part only. In fact, the quotation begins in the middle of a sentence and accordingly fails to express the entire thought. The statements of counsel for

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* Italics are respondent's.

the petitioners appearing at pages 71, 86 and 87 of the Transcript of Record made certain that the petitioners and their counsel throughout entertained the honest conviction that they were exercising and attempting to defend a constitutional right well within any legal limitation thereon. If any such confession as respondent now asserts had been made it is interesting to note that neither the California trial nor appellate tribunals observed it.

**A serious defense was made of each of the editorials.**

Respondent, under its sixth point (Supp. Br. p. 61), respecting the editorial "Probation for Gorillas?" cites from the opinion of the state court:

> "'But little is said, or can be said, in defense of the publication of this editorial' (R. 131), and that:
> '* * * petitioner, The Times-Mirror Company, advances no serious defense of its publication of said editorial in so far as the character and nature of the editorial are involved * * *.' (R. 131.)"

Our briefs before the Supreme Court of the State of California are no part of the record before this Court, and we are without authority to make any reference to their contents. A reference, however, to the Opinion of the Supreme Court of California, which is a part of the Transcript of Record, will disclose (R. 131 to 134) that the defenses to this editorial were more numerous than to either of the other two. The defenses to this editorial embraced all the defenses to the other editorials, and in addition, involved the defense relating to probation matters and also required a more extended consideration by the Supreme Court of California of the facts than was given by that court to a consideration of either of the other editorials.

The statement of the State court that petitioner "advances no serious defense" concededly expresses the view

of the State's highest judicial tribunal. If there was no serious defense advanced to this editorial, there was no serious defense advanced to either of the other two. We had always considered, however, that the contention that the convictions unlawfully abridged the right of freedom of speech and of the press guaranteed by the Federal Constitution was a serious defense. The granting of the writ of certiorari by this Court confirms our opinion.

**The present danger doctrine is not inherently inapplicable to contempt.**

The trial judge, to whose opinion respondent so frequently refers and from which respondent frequently quotes, declared that the clear and present danger doctrine as applied to constructive contempt proceedings would result absurdly because one or more contempts would be passed by as unimportant and the court would be unable to act until "so many contempts had been committed that the courts and the Government would have been undermined, by which time there would have been so great a popular uprising as to change the form of government, whereupon there would be no courts and therefore no contempt" (R. 106). Respondent embraced this doctrine and in its Brief in Opposition to the Petition for Writ of Certiorari (p. 42) quoted at length from the opinion. Respondent now (Supp. Br. p. 28) appears to have abandoned the trial court's reasoning and conclusion and adopted petitioner's statement or confession, as respondent is pleased to term it (Supp. Br. p. 28) that "interference with one judge or one judicial proceeding" is a "substantive evil which the State constitutionally may seek to prevent" and hence "within the allowable area of State control." Respondent now apparently considers that the reason assigned by the

trial court for declaring the present danger doctrine inherently inapplicable to contempt proceedings is not persuasive.

Respondent then considers what it terms "the rationale of the *Thornhill* decision" and declares that it "forbids application of this standard [present danger] to contempt of court * * *" (Supp. Br. p. 28). From the opinion of the *Thornhill* case * respondent quotes:

> "Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period" (Supp. Br. p. 30).

The "Sit-Strikers Convicted" editorial read in the light of the exigencies of that date as disclosed by the Chandler affidavit, the facts of which were stipulated to be true (R. 134), is within the scope of the thought expressed in the sentence just quoted from the Thornhill opinion. Respondent contends, however, that "freedom of discussion" as defined in the Thornhill opinion is satisfied "as to pending litigation, by discussion after the ruling is made, by the right of recall, or refusal to reelect" (Supp. Br. p. 31). The "right of recall" or "refusal to reelect" are not substitutes and neither is a substitute for the fundamental right of free speech or a free press. In many states there is no right of recall of judicial officers. In others many judicial officers are appointed. Regardless of this, we contend that in no opinion of a court of record that we have found on the subject is there an intimation that the fundamental rights guaranteed by the First and Fourteenth Amendments to the Federal Constitution may be annulled or abridged by a statutory right analogous

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* 310 U. S. 88.

to the right of recall or the right to exercise the elective franchise.

Respondent continues:

> "It should be remembered that discussion is not necessarily deferred until the entire cause is ended; that it is improper only as to *pending matters*" (citing the *Shuler* case, 210 Cal. at 387). (Supp. Br. p. 31.)

Why respondent did not cite the opinion of the State Court in the *Times* case is interesting to contemplate. There the California Supreme Court declared that comment in criminal cases was not permissible with reference to a verdict of guilty after it had been returned and entered. The opinion reads:

> "It cannot be successfully contended that the verdict was decisive of the case or was a final determination of the fate of the defendants" (R. 125).

Respondent's statement that comment "is improper only as to pending matters" involves an interpretation of the term "pending."

In the editorial "Sit-Strikers Convicted" the comment, so far as it related to the criminal proceeding, commented upon a verdict which had been entered. That was not a pending matter. A motion for a new trial was not pending; neither was an application for probation (R. 10). There was no comment upon the passing of sentence if it be considered a pending matter.

In the editorial "The Fall of an Ex-Queen" the verdict had been returned and entered. The editorial made no reference to the case. The Supreme Court of California admits as much (R. 130). The record discloses that a motion for new trial was pending (R. 17). The editorial, however, makes no reference to the motion for new trial nor to any other pending matter.

In the editorial "Probation for Gorillas?" there was a direct reference to a pending matter, namely, the application for probation (R. 23). That such reference did not constitute an unlawful exercise of the right of a free press has been the thesis of our briefs and argument.

**Petitioners seek no special immunity, only equal protection of the laws.**

Respondent believes that petitioners seek special immunity and not the equal protection of the laws (Supp. Br. pp. 42-43). Such is not the petitioners' purpose. We ask only the same consideration as was accorded the humble petitioners in the several cases beginning with *Fiske* v. *Kansas* and terminating with *Cantwell* v. *Connecticut*. In each instance rights accorded under the First and Fourteenth Amendments to the Federal Constitution were not fully recognized by the courts of the several States.

**Facts or contentions *dehors* the record do not influence the court.**

In the Supplemental Brief of respondent (pp. 53 to 60) appears much matter *dehors* the record. It consists of extended quotations from Respondent's Brief before the Supreme Court of California (Supp. Br. pp. 53, 56 to 60, inc.), statements of fact relating to efforts of the Bar Association Committee (Supp. Br. p. 59, footnote), and statements of other facts said to be well known in the locality (Supp. Br. pp. 53-54). These matters *dehors* the record are not alone entirely lacking in persuasiveness of a correct determination of the problem here imposed upon this Court, but, pursuant to the elementary rule which this Court on a few occasions has found necessary to announce, do not in any degree influence the court's determination of the case.*

* *Schley* v. *Pullman Car Co.*, 120 U. S. 575, 578; *Maryland Casualty Co.* v. *Jones*, 279 U. S. 792, 796; *Hussman* v. *Durham*, 165 U. S. 144, 150.

**_Herndon_ v. _Lowry_ supports petitioners' contention.**

Respondent, declaring the contrary of the thought expressed in the preceding headnote, states:

> "None of the cases so far decided rejects 'reasonable tendency' to accomplish a harmful result where that test has been prescribed by the legislature." (Supp. Br. p. 35.)

The most recent statement on the subject is found in *Cantwell v. Connecticut*, 310 U. S. 296 at 307, 308, where it was held:

> "Such a declaration of the State's policy would weigh heavily in any challenge of the law as infringing constitutional limitations."

However, the point of respondent's contention is not apparent when it is recalled that the California Legislature in its declaration of policy upon this subject has specifically prohibited summary prosecutions for constructive contempt by publication, that the petitioners relied upon this statute, and that the Supreme Court of California in the majority opinion held the statute unconstitutional.*

**Comparative certainty of the tendency and danger tests.**

Under this heading respondent (Supp. Br. p. 38) argues that the circumstance that there have been dissenting opinions in the cases there cited is proof that the clear and present danger test is not more certain than the reasonable tendency test. We had considered that the case of *Herndon v. Lowry* is the first instance where this Court was compelled to choose between the tendency test and the clear and present danger doctrine. In the Herndon case the tendency

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* R. 121; cf. *Bridges* v. *Superior Court*, 14 Cal. (2d) 464, 479, *et seq.*

test was designated the "dangerous tendency" (301 U. S. at 256). We appreciate of course that the rule was specifically announced in the opinion of Justice Holmes in *Schenck* v. *United States*, 249 U. S. 47 at 52. Until *Herndon* v. *Lowry*, however, we understand the decision of the lower court was not reversed because of a failure to apply the clear and present danger doctrine. It is observed that Justices Van Devanter and McReynolds, concurring in *Schenck* v. *United States* dissented in *Herndon* v. *Lowry*. This circumstance causes us to believe that Justices Van Devanter and McReynolds in concurring in *Schenck* v. *United States*, where the judgment below was affirmed, did not feel that they were committed to the clear and present danger doctrine. Again in *Abrams* v. *United States*, 250 U. S. 616, in *Schaefer* v. *United States*, 251 U. S. 466, in *Pierce* v. *United States*, 252 U. S. 239, in *Gilbert* v. *Minnesota*, 254 U. S. 325 and in *Gitlow* v. *New York*, 268 U. S. 652, referred to by petitioners (Supp. Br. p. 38), the judgments of conviction below were in each instance affirmed and the justices dissenting, viz., Justice Holmes and Justice Brandeis, were exponents of and advocated the clear and present danger doctrine. Conscious that we may be in error in our conclusion, and realizing that respondent has positively so declared (Supp. Br. p. 17, footnote 18), we yet entertain the belief that not until the decision of *Herndon* v. *Lowry* did the court by a majority opinion, where the question was necessary to the decision, embrace the clear and present danger doctrine and reject the tendency or dangerous tendency test. Subsequent to the decision in *Herndon* v. *Lowry*, unanimity of opinion has resulted from the application of the clear and present danger doctrine. Mr. Justice McReynolds alone dissented (each time without an opinion) in *Schneider* v. *State*, 308 U. S. 147, *Thornhill* v. *Alabama*, 310 U. S. 88, and *Carlson* v. *State of California*, 310 U. S. 106, but concurred in the unanimous opinion of the court in the

recent case of *Cantwell* v. *Connecticut*, 310 U. S. 296. The history of decision in the Supreme Court of the United States involving the application of the clear and present danger test we respectfully submit has resulted in unanimity of opinion and not in uniform disagreement and dissent as respondent contends.

## CONCLUSION.

For the reasons assigned in the petitioners' briefs, the judgment of the Supreme Court of California should be reversed.

Respectfully submitted,

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